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Consumer Protection—Lotteries: "Bonus Bingo"—The Great Safeway Lottery.—State ex re. Schillberg v. Safeway Stores, Inc., 75 Wash. Dec. 2d 351, 450 P.2d 949 (1969)

anon

RECENT DEVELOPMENTS

CONSUMER PROTECTION—LOTTERIES: "BONUS BINGO"—THE GREAT SAFEWAY LOTTERY.—*State ex rel. Schillberg v. Safeway Stores, Inc.*, 75 Wash. Dec. 2d 351, 450 P.2d 949 (1969).

Safeway Stores, Inc. conducted a promotional advertising game, bonus bingo, to attract customers to their grocery stores in Snohomish County. To win at bonus bingo, participants had to obtain a booklet of game cards from any Safeway outlet, visit Safeway Stores to pick up prize slip numbers for particular game cards, and present the winning card to a Safeway Store manager to collect the prize. The local Prosecuting Attorney, convinced that Safeway's promotion was an illegal lottery,[1] sued for declaratory judgment on the legality of bonus bingo, and for an injunction[2] to halt such advertising practices. Two lottery elements, a distribution of money or property and chance, were readily apparent in this promotion; the legal question before the court was whether there was adequate consideration flowing from the participants to the promoter.[3] The Washington Supreme Court held that consideration was present; therefore, bonus bingo was a lottery, a public nuisance, and subject to injunctive action. *State ex rel. Schillberg v. Safeway Stores, Inc.*, 75 Wash. Dec. 2d 351, 450 P.2d 949 (1969).

1. WASH. REV. CODE § 9.59.010 (1956):
A lottery is a scheme for the distribution of money or property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance, whether it shall be called a lottery, raffle, gift enterprise, or by any other name, and is hereby declared unlawful and a public nuisance.
Every person who shall contrive, propose or draw a lottery, or shall assist in contriving, proposing or drawing a lottery, shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than one thousand dollars, or by both.

2. WASH. REV. CODE § 7.48.200 (1957): "The remedies against a public nuisance are: Indictment or information, a civil action, or abatement."
In Safeway, the Prosecuting Attorney instituted a civil action asking that respondent be required to cease and desist the allegedly illegal scheme. No penal sanction was asked for or contemplated.

3. The court framed the question thus:
. . . whether a member of the public who participates in bonus bingo as a player seeking to win prize money, even though he pays no fee, buys no tickets, and wagers no property, tangible or intangible, advances what in law would constitute a consideration upon that chance to win a prize.
State *ex rel.* Schillberg v. Safeway Stores, Inc., 75 Wash. Dec. 2d 351, 357, 450 P.2d 949, 953 (1969).

Historically, lotteries have been viewed with suspicion and distrust. A report from England described the serious evils of lotteries in the early 1800's thusly:[4]

> These included cases where people living in comfort and respectability had been reduced by their speculations to "the most abject state of poverty and distress"; the cases of domestic quarrels, assaults, and the ruin of family peace; fathers deserting their families and falling into want and disgrace; mothers neglecting their children, sometimes leaving them destitute; wives robbing their husbands of the earnings of months and years; and the pawning of clothing, beds and wedding rings in order to indulge in speculation. "In other cases, children had robbed their parents, servants their masters; suicides had been committed, and almost every crime that can be imagined had been occasioned, either directly or indirectly, through the baneful influence of lotteries."

The American reaction was similarly antagonistic.[5] An early judicial pronouncement stated[6]

> Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places but the latter infests the whole community. It enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and the simple.

Washington State evidenced a corresponding displeasure with lot-

4. F. WILLIAMS, FLEXIBLE PARTICIPATION LOTTERIES 5 (1938) [hereinafter cited as WILLIAMS]. This book, with a 1956 supplement, is the only treatise on the subject of lotteries, and presents an entertaining and informative history of lottery activity in the United States.

5. In 1830 a member of the Pennsylvania legislature declared that:

> the lottery destroys the happiness of the poor by its false hopes, draws them away from labor and industry and leads to pauperism, misery and crime. As a means of raising money it is worst imaginable.

7 MCMASTER, HISTORY OF THE PEOPLE OF THE U.S. 154, *quoted in* WILLIAMS, *supra* note 4, at 6 n.6.

Mr. Williams himself reasoned that:

> But though they [lotteries] supply a ready mode of replenishing the public treasury, they have always been found to exact a mischievous influence upon the people. The poor are invited by them rather than the rich. They are diverted from persistent labor and patient thrift by the hope of sudden and splendid gains; and as it is the professed principle of these schemes to withhold a large part of their receipts, a necessary loss falls upon that class which can least afford to bear it.

WILLIAMS, *supra* note 4, at 311.

6. Phalen v. Virginia, 49 U.S. (8 How.) 163, 168 (1850).

teries by inserting in the state constitution[7] a provision which has been broadly interpreted as a plain and simple ban against the conduct of any lottery.[8] This constitutional provision has been reinforced by specific anti-lottery legislation.[9]

To constitute a lottery in Washington, three elements must be present; prize, chance and consideration.[10] The Washington Court has displayed a propensity to interpret broadly the requirement of "a valuable consideration." In *Society Theatre v. Seattle*,[11] plaintiff theatre owner distributed, without charge, tickets for a grocery drawing to all persons attending the theatre on a given night. The court held that this type of promotion was a lottery, stating that:[12]

> . . . while patrons may not pay, and the respondents may not receive any direct consideration, there is an indirect consideration paid and received. The fact that prizes of more or less value are to be distributed will attract persons to the theatre who would not otherwise attend. In this manner those obtaining prizes pay consideration for them, and the theatre reaps a direct financial benefit.

In *State v. Danz*,[13] the court was confronted with a situation similar to that in *Society*. Participants were not, however, obligated to purchase theater seats in order to obtain tickets for the free groceries drawing. The court, seeing no meaningful distinction between the cases, ex-

7. WASH. CONST. art. II, § 24:
The legislature shall never authorize any lottery, or grant any divorce.

8. WASH. CONST. art. II, § 24 has been held to be "mandatory and . . . self executing." Seattle v. Chin Let, 19 Wash. 38, 40, 52 P. 324 (1898).
In State *ex rel.* Evans v. Brotherhood, 41 Wn. 2d 133, 145, 247 P.2d 787, 794 (1952) the court held that slot machines in private clubs constituted a form of lottery. Commenting on art. II, § 24, the court stated:
> . . . we feel most strongly that the language of this constitutional provision *is not ambiguous*. The provision is phrased in the broadest and most sweeping terms. It prohibits *any* lottery. We believe the word 'any,' given its usual meaning, is all embracing as far as different types and kinds of lottery schemes and devices are concerned. Clearly, its meaning seems to us to be the equivalent of the terms of *all* or *every*.

9. WASH. REV. CODE § 9.59.010, *supra* note 1.
For a complete list of all state constitutional provisions, state and federal statutes forbidding or severely restricting lotteries see 2 GA. L. REV. 132, 133 n.5 (1967).

10. Society Theatre v. Seattle, 118 Wash. 258, 260, 203 P. 21, 22 (1922).
A lottery is defined in WASH. REV. CODE § 9.59.010, *supra* note 1, as a "scheme for the distribution of money or property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance . . . ."

11. 118 Wash. 258, 203 P. 21 (1922).

12. *Id.* at 260, 203 P. at 22.

13. 140 Wash. 546, 250 P. 37 (1926).

tended its broad concept of indirect consideration and ruled that the scheme was illegal.[14]

In *Safeway*, the court reviewed its previous pronouncements on the broad scope of the constitutional and statutory provisions declaring lotteries illegal, reaffirmed the broad interpretation developed in the *Society* and *Danz* cases, and set down what was hoped to be the definitive statement on lottery promotions in Washington State. Applying the law to the specific facts of the case, the court had no trouble concluding that a valuable consideration was present in the bonus bingo promotion.[15]

> Benefits in the form of increased sales, goodwill and public response to advertising of Bonus Bingo amounted to a consideration valuable indeed to the promoters and supplied the third element, consideration.

The court further sustained its decision by dusting off some historic suspicions against lotteries, stating:[16]

> . . . laws against lotteries are designed to prevent the public from wagering their substance upon chance and fortuitous events so that one cannot be enticed to hazard his earnings on a chance to win a prize. . . . [Anti-lottery] laws are designed . . . to preclude . . . the promoter . . . from reaping an unearned harvest at the expense of the players; to prevent the wary from preying upon the unwary; and to discourage the overly shrewd from exploiting the natural yearning in most everyone to get something for nothing, and to put a damper on the actions of those who receive from the device much more than they part with in prizes.

The court's emphasis on the "inherent evils" of lotteries, when applied to bonus bingo seem inappropriate when placed in the context of our highly competitive, Madison Avenue permeated society which not only accepts spectacular advertising promotions and sweepstakes,

14. *Id.* at 548-49, 250 P. at 28, where the court stated:
None such [free tickets] were given out as a matter of fact and if there had been, it would not of itself have made any difference. If in the flourishing days of the Louisiana lottery its management had advertised that it would give a free ticket to the president of every bank in the city of New Orleans, that would not have changed the scheme from a lottery, whether or not any one or all of such free tickets were accepted.
15. *Safeway* at 362, 450 P.2d at 955-56.
16. *Id.* at 363, 450 P.2d at 956 (1969). *See also* WILLIAMS, *supra* note 4, at 332.

but presumably enjoys them. It is difficult to see how participation in bonus bingo would lead to "a substantial loss of earnings," impoverishment of the unwary," or an "encouragement of the gambling spirit."

A more rational basis for the court's decision may be found in the consumer protection arguments, presented by the Washington State Attorney General's Office in an amicus brief,[17] that games of chance, such as bonus bingo, constitute unfair trade practices and unfair methods of competition.[18] These dangers are apparent: deceptive advertising techniques have been used to deprive participants of accurate information relating to their chances of winning, and the number of prizes available;[19] contests have been rigged, depriving the participant of any chance of winning;[20] large firms may obtain an unfair competitive advantage over those competitors unable to devote large resources to promotional schemes;[21] competitive benchmarks of price and quality of goods and services can be shifted to promotional "extras;"[22] and the additional costs of these games are eventually borne by the consumer in the form of higher grocery prices,[23]

17. Brief for Consumer Protection Division, Attorney General's Office as Amicus Curiae at 1-3, 30-42. For a more detailed discussion of consumer protection arguments see notes 18-23 and accompanying text *infra*.

See also, Washington v. Arden-Mayfair, No. 654850 (King County Super. Ct., Feb. 27, 1967), Washington v. Arden-Mayfair, No. 167486 (Pierce County Super. Ct., Dec. 6, 1965), and White House Market, Inc. v. Nelle, No. 41169 (Whatcom County Super. Ct., May 11, 1966) cited in Appendixes A, B and C of the Attorney General's amicus brief in which promotional games of chance, similar to bonus bingo, were held to be unlawful as deceptive trade practices within the meaning of the Washington State Consumer Protection Act, WASH. REV. CODE § 19.86.020. None of these cases have been appealed.

18. For a detailed discussion of these unfair methods of competition and deceptive trade practices see Trade Regulation Rule, Part 419—Games of Chance in the Food Retailing and Gasoline Industries, and accompanying Statement of Basis and Purpose of Trade Regulation Rule, 34 Fed. Reg. 13302 (1969); 2 TRADE REG. REP. 7975 (1969) (containing separate opinions of commissioners and other material not printed in Fed. Reg.). *See also* 42 WASH. L. REV. 668, 675-79 (1967).

19. 34 Fed. Reg. 13302, 13306 (1969).

20. *Id.* at 13304.

21. The argument of unfair methods of competition proceeds along these lines: Only national chain organizations can afford the cost of lavish promotions like bonus bingo. Thus, corporate giants by means of their superior spending capacities obtain an unfair advantage over local grocery chains and independent supermarkets. The argument is unsound. Even if bonus bingo and similar promotions were banned, large chains would still be capable of paying for more extensive advertising, thus obtaining an "unfair" advantage over smaller firms.

22. 34 Fed. Reg. 13302, 13307 (1969).

23. Those advocating prohibition or regulation reason that game promoters are not charitable enterprises and are motivated by profits alone. If Firm A presents a promotion

If the court failed to see these dangers, it should acknowledge them in the future. If the court consciously disregarded them in favor of the anti-gambling rationale, it sidestepped the twentieth century problems raised by these games of chance.

Not only did the court fail to articulate the real policies which its rule might protect, its definition of consideration was much broader than that demanded by the facts of the case. Safeway's bonus bingo required a considerable amount of time and effort on the part of the participant, even though no purchases were necessary.[24] Yet, on the matter of consideration the court stated:[25]

> Under our Constitution and lottery statute therefore, *one need not part with something of value*, tangible or intangible, to supply the essential consideration for a lottery. He may, in order to secure a change to win a prize awarded purely by lot or chance, supply the consideration by his conduct or forebearance which vouchsafes a gain or benefit to the promoter of the scheme. The benefit or gain moving to the one need not be the same as the detriment to the other. *Consideration for a lottery may be both gain and detriment or one without the other.* (Emphasis added.)

costing the firm $1,000,000 or more, it hopes to more than pay for the scheme with increased sales and profits. When competitors B, C, and D are forced to follow suit (assuming equal appeal to consumers), the likely result will be increased advertising costs to all firms with no appreciable gain in business to offset these expenditures. The net effect is higher prices to consumers.

Store owners argue that promotions are simply another form of advertising, that if bonus bingo is prohibited, the money will simply be spent on other advertising promotions. Thus, consumer prices will not decrease even if the games are prohibited. *See Safeway*, 75 Wash. Dec. 2d at 355, 450 P.2d at 952 where it is stated:

> Bonus Bingo did not, according to the agreed facts, affect the quality or prices of Safeway's merchandise or otherwise alter its merchandising policies.

24. *Safeway*, 75 Wash. Dec. 2d at 352-55, 450 P.2d at 951-52.

25. *Id.* at 361, 450 P.2d at 955.

This broad contractual theory of consideration as a necessary element in lottery promotions has been favored by a majority of courts. WILLIAMS, *supra* note 4, has compiled an extensive list of all lottery cases in his 1956 Supplement. His tally reveals that 65 of 89 cases recorded to 1956 have accepted the broad contractual theory of consideration set down by *Safeway*. More recent decisions in accord with this proposition include: State v. Eckerd's Suburban, Inc., 53 Del. 103, 164 A.2d 873 (1960); Midwest Television, Inc. v. Waaler, 44 Ill. App. 2d 401, 194 N.E.2d 653 (1963); Blackburn v. Ippolito, 156 So. 2d 550 (Fla. 1963); Boyd v. Piggly Wiggly Southern, Inc., 115 Ga. App. 628, 155 S.E.2d 630 (1967); Idea Research v. Hultman, 256 Iowa 138, 131 N.W.2d 496 (1964).

However, there is a body of case law which adheres to a more stringent pecuniary notion of consideration as an element of a lottery promotion. In addition to the 24 pre-1956 cases cited by Williams, decisions agreeing with this narrower view since 1956 include: California Gasoline Retailers v. Regal Petroleum Corp. of Fresno, 50 Cal. App. 2d, 330 P.2d 778 (1958); Cudd v. Aschenbrenner, 233 Ore. 272, 377 P.2d 150 (1962); People v. Eagle Food Centers, Inc., 31 Ill. 2d 535, 202 N.E.2d 473 (1964); Maine v. Bussiere, 155 Me. 331, 154 A.2d 702 (1959).

The court apparently disregarded the specific language of the Washington anti-lottery statute, R.C.W. 9.59.010, which states that persons must pay or agree to pay *a valuable consideration.*[26] Under the terms of the statute, the court was in error when it stated that ". . . one need not part with something of value, tangible or intangible, to supply the essential consideration for a lottery."

Furthermore, the court gave only passing notice to defendant Safeway's contention that since the lottery statute was a criminal statute, the provision requiring "a valuable consideration" must be strictly construed.[27] Perhaps the court was influenced by the fact that the case was a civil action brought for a declaratory judgment and an injunction in which no criminal sanctions were sought.[28] Moreover, prior case law had firmly established a rule of broad interpretation of the consideration element.[29]

The court was not required to establish the sweeping rule that it did in *Safeway*. Safeway did obtain valuable consideration from conducting bonus bingo. Participants had to read Safeway advertisements diligently and continuously; they made many visits to Safeway outlets; and Safeway sales did substantially increase.[30] A direct and objectionable result of the *Safeway* decision is that many promotions which require minor participation (detriments) by customers or obtain negligible results (benefits) for promoters, are now prohibited.

This conclusion is reinforced by a study of the *Sherwood and Roberts*

26. *See* note 1 *supra.*

27. In D'Orio v. Jacobs, 151 Wash. 297, 302, 275 P. 563, 565 (1929), defendant sought to recover the purchase price of "Advertoshare" games, relying on the affirmative defense that "Advertoshare" was a lottery. Holding that "Advertoshare" was not a lottery, since prizes won were based on the skill of a checker player, the court commented on the lottery statute as follows: "This is a penal statute and must be strictly construed . . . ."

Accord, Federal Communications Commission v. American Broadcasting Company, 347 U.S. 284, 296 (1954). Commenting on 18 U.S.C. § 1304 (1948), a statute prohibiting the broadcasting of any lottery, the Court stated:

> If we should give Sec. 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also it would do violence to the well established principle that penal statutes are to be strictly construed.

See also Caples v. United States, 243 F.2d 232 (D.C. Cir. 1957).

28. *See* text accompanying note 2 *supra.*

29. *See* text accompanying notes 10-15 *supra.*

30. *Safeway* 75 Wash. Dec. 2d at 355, 450 P.2d at 952.

—*Yakima, Inc. v. Leach*[31] decision in which the Washington Supreme Court held that a referral selling scheme was a lottery, and therefore illegal. The *Sherwood* court enunciated a broad definition of the element of chance necessary in a lottery promotion, stating that "[c]hance within the lottery statute is one which dominates over skill or judgment."[32] The court continued:[33]

> . . . chance permeates the entire scheme . . . . [There was] a chance that the referrals might not be interested; that the salesman might not adequately make his presentation; that the referral might have already been referred by someone else; that the market might be saturated; and that the salesman might not even contact the referral.

It is clear from this case that "chance" includes virtually any kind of chance, not just the old lottery definition of a drawing by lot.

Sherwood and *Safeway* have expanded the lottery concept far beyond the traditional notion of a gambling lottery and even beyond promotional games which prey on the consumers who are duped into believing that they may be getting something for nothing. Examination of four common advertising promotions may suggest the scope of the broad definitional pronouncements in *Sherwood* and now *Safeway*:

(1) Firm A distributes a mailer to "occupants" indiscriminantly. The mailer contains a stamped return envelope announcing a drawing for a prize. All customer B must do is sign the card and drop it in a mail box. A lottery? Probably so under *Safeway*. It may be reasoned that the customer suffers a "detriment" in signing his name and mailing a card. Alternatively, firm A is certainly receiving a "benefit" by getting a new name for its mailing list.

(2) Store C advertises an item at a sharply reduced price with the caveat—"limited quantity available." A lottery? Quite possible under *Safeway*. There is a prize[34]—merchandise available at a greatly reduced price; since there is only a limited quantity available, there is only a "chance"[35] that the customer will be one of the first in line; and

31. 67 Wn. 2d 618, 409 P.2d 160 (1965), *noted in* 42 WASH. L. REV. 668 (1967).
32. *Id.* at 622, 409 P.2d at 163.
33. *Id.* at 623, 409 P.2d at 163.
34. "Prize," as defined in WASH. REV. CODE § 9.59.010, *supra* note 1, is "a distribution of money or property."
35. A detailed discussion of the "chance" element in lottery schemes is found in

there is consideration—a benefit to the entrepreneur in increased sales, and/or a "detriment" to the participant who must drive to the store and be exposed to the sales pitch of the retailing firm.

(3) Firm E, as an added inducement to its customers, advertises that it will be having a drawing for a free ski weekend for two. All the individual is required to do is "just fill out the coupon below and drop it in the box at store E." Of course, no purchase is required. Under the *Safeway* decision, this promotion is a lottery, and the store owners are theoretically punishable by a fine, imprisonment or both.[36]

(4) Firm X advertises a free weekend for two in Europe. Customer B must purchase the product manufactured by Firm X, but must also write in ten words or less why he considers the product to be superior. This promotional advertising scheme would not be a lottery because the element of skill preponderates over that of chance, and thus, a necessary element of the lottery scheme is absent.[37]

In sum, the result of the *Safeway* decision is a total prohibition of a wide range of promotional devices which do not even remotely resemble the traditional lottery.

Furthermore, the decision, although analytically deficient, has been accepted in practice by the major retailers.[38] Gas stations and national supermarket chains no longer promote games of chance within the State of Washington.[39] National promotional games are rarely distributed within the State, but, when they are, they ordinarily state on

Sherwood and Roberts—Yakima, Inc. v. Leach, 67 Wn. 2d 618, 409 P.2d 160 (1965) (discussed in text accompanying notes 31-33 *supra*). From this case's broad interpretation of chance, it is conceivable that the "chance" of not being present at Firm C in time to purchase the advertised limited quantity item would qualify as an element of lottery promotion.

36. *See* WASH. REV. CODE § 9.59.010 (1956), *supra* note 1. *See also* WASH. REV. CODE §§ 9.59.020-.040 (1909) which define various aspects of lottery promotions as gross misdemeanors.

37. *See* note 27 *supra* on the distinction between skill and chance.

38. The Consumer Protection Division of the Attorney General's Office reports general compliance with the *Safeway* decision and the Division is pleased with the attitude of both consumer and business establishments in their acceptance of the lottery prohibition. However, there is still a great problem among small chain and individually owned businesses. Owners of these establishments do not realize the broad sweep of the *Safeway* decision and do not fully comprehend that their advertising practices are now illegal. Interview with Christopher T. Bayley, Deputy Attorney General, Chief, Consumer Protection and Anti-trust Division, and James M. Kennedy, Assistant Attorney General, Consumer Protection Division in Seattle, Washington, November 1, 1969.

39. *Id.*

the entry blank "offer subject to all federal, state and local laws and regulations" or "Naturally, the sweepstakes is void where prohibited by law."[40] Even local television stations, wary of possible violations, are voluntarily broadcasting "void in Washington State" disclaimer notices during lottery-type daytime quiz shows.[41] But problems persist in relation to advertising practices of individual and small chain store operators.[42]

Assuming that there are valid reasons[43] for legal control of schemes like bonus bingo, it is important to decide whether or not prohibition of promotional games is the best solution. Proponents of the prohibition technique reason that prohibition is the simplest, most direct method of ridding our society of these schemes; no special bureaus or boards need be established to peruse irregularities when a practice is declared illegal; deceptive promotional devices and unfair methods of competition will cease.[44]

However, there are advantages to a regulatory approach. In addition to giving the consumer a more informed basis on which to determine whether or not he will participate, the regulatory method hits at the real evils of these games of chance, *i.e.* unfair competition and deceptive advertising. Regulation is also more consistent with our free enterprise system of open competition in that it does not foreclose all legal use of this particular type of advertising promotion. Finally, the definitional elements of prohibited practices could be established by administrative rules aimed at specific abuses in order to give both businessmen and law enforcement agencies adequate guidelines to control their activities.

Detailed regulation of games of chance is provided for in a rule

40. *See, e.g.*, GOOD HOUSEKEEPING, Nov. 1969, at 249; LOOK, Nov. 4, 1969 at 67. *But see*, LOOK, Oct. 7, 1969, at 62 where no statements regarding state laws are mentioned.

41. KING—TV, the NBC affiliate station in Seattle, inserted the disclaimer on the following shows: "Personality," "Jeopardy," "You Don't Say" and "The Match Game" during the spring and summer of 1969. These shows included a home participation aspect in which television viewers were asked to send a postcard to the station to be eligible for prizes to be given on the show. Coincidentally, all quiz programs with this home participation gimmick have been dropped from the NBC fall 1969 daytime schedule. Interview with Bill Hall, Operations Manager, KING—TV, Seattle, Washington, October 13, 1969.

42. *See* note 38 *supra.*

43. *See* notes 17-23 and accompanying text *supra.*

44. 34 Fed. Reg. 13302, 13307 (1969); 2 TRADE REG. REP. ¶ 7985 at 12963 (dissent).

recently adopted by the Federal Trade Commission.[45] The rule requires game promoters to disclose on all of the game pieces the exact number and value of prizes available; the odds of winning each prize (to be revised weekly if a game extends beyond thirty days); the category, the total number of game pieces distributed, the number of outlets participating; and the scheduled termination date of the game. Promoters are also required to post these details in each retail outlet and to furnish the Commission with a list of prize winners by prize category, the total number of game pieces distributed, the number of prizes made available and the number of prizes awarded.

Some states have enacted legislation to remedy specific abuses in promotional games of chance. In Michigan[46] and in New York,[47] statutes are specifically directed at supermarket and gasoline station promotions. These laws require disclosures by game promoters similar to those prescribed under the FTC Rule to enable the consumer to

45. The Trade Regulation Rule, *supra* note 18, adopted in 1969 by a four to one vote, is printed in full in 34 Fed. Reg. 13302 (1969).

Evidence and testimony presented to the Federal Trade Commission did not reveal a unanimity of support for the regulatory approach. 34 Fed. Reg. 13307 (1969). Commissioner Elman, in a dissenting opinion (2 TRADE REG. REP. ¶ 7985 at 12963), vehemently opposed adoption of the Trade Regulation Rule, describing it as an "empty gesture," "unenforceable" and "not in the public interest."

The Commission concluded its report thusly:

> The rule we adopt today is intended to correct the promotion and employment in a deceptive manner of games of chance. The proper function of a regulatory agency is to correct, by regulation if possible, unlawful activity rather than to prohibit the device altogether. It is possible that this rule will not have the intended results, or that compliance with it may not be forthcoming. Perhaps this industry may not be susceptible of regulation. In that event, the Commission to protect the public interest, will consider imposition of a stricter, prohibitory rule. In any event the rule announced today will be reconsidered by the Commission 18 months following its effective date.

34 Fed. Reg. at 13310.

The scope of this note precludes a detailed discussion of the rationale behind this new rule. For further information on this subject, see G. ALEXANDER, HONESTY AND COMPETITION (1967); and *Symposium: Federal Trade Commission Regulation of Deceptive Advertising*, 17 KAN. L. REV. 551-651 (1969).

46. MICH. STAT. ANN., ch. 28.604 (1) § 750.372a (Supp. 1969). For an interesting history of Michigan's position on lotteries and the judicial prodding necessary to obtain this specific legislation see People v. Brundage, 381 Mich. 399, 162 N.W.2d 659 (1968).

47. N.Y. GEN. BUS. LAW § 369-g (McKinney Supp. 1969). *See also* memorandum comment by Governor Rockefeller on the purpose of this legislation, N.Y. Sessions Laws, at A-326 (McKinney Supp., No. 6, June 25, 1969).

Since New York State authorizes and promotes a state-wide lottery for the benefit of its public school system, the New York State Legislature could only have enacted legislation relating to specific types of lottery promotions—games of chance in the supermarket and gas station businesses.

make an informed decision as to whether or not he wants to participate. Florida[48] allows games of chance only under certain circumstances.

Wisconsin, while retaining lottery prohibition as the primary tool of legal control, has adopted both a constitutional and statutory amendment to define in detail what constitutes "consideration" in a game of chance.[49] Wisconsin's handling of the lottery problem should be of special interest to Washingtonians, for the broad, self-executing Washington State constitutional provision banning all lotteries[50] was taken directly from the Wisconsin Constitution. Attempting to establish more feasible legal controls over lottery promotions, Wisconsin amended its constitution thusly:[51]

> The legislature shall never authorize any lottery or grant any divorce. Except as the legislature may provide otherwise, to listen to or watch a television or radio program, to fill out a coupon or entry blank, whether or not proof of purchase is required, or to visit a mercantile establishment or other place without being required to make a purchase or pay an admittance fee does not constitute consideration as an element of lottery.

A statutory amendment,[52] however, did "provide otherwise" and now a visit to a mercantile establishment does constitute consideration. Although the Wisconsin definitional approach does not directly attack the evils[53] of these promotional schemes, it does give business firms a clearer idea of what they can and cannot do in the area of games of chance.

48. FLA. STAT. ANN. § 849.092 (Supp. 1969). This provision allows licensed businesses to give away prizes to persons selected by lot if such gifts are conducted as advertising and promotional undertakings, in good faith, solely for the purpose of advertising the goods, wares and merchandise of such licensee. No person eligible to receive a gift shall be required to pay any tangible consideration to or purchase anything of value from the licensee.

49. WIS. CONST. art IV, § 24. WIS. STAT. ANN. § 945.01(2)(b)(2) (Supp. 1969). For a recent interpretation of the statutory and constitutional amendments and the potential conflicts between them see Kayden Industries, Inc. v. Murphy, 34 Wis. 2d 718, 150 N.W.2d 447 (1967). *See also* Mundschau, *Wisconsin Lotteries—Are They Legal?*, 67 WIS. L. REV. 556 (1967).

50. *See* note 7 *supra*.

51. WIS. CONST. art. IV, § 24.

52. WIS. STAT. ANN. § 945.01(2)(b)(2) (Supp. 1969). The statutory amendment listed most of the constitutional exemptions, but did not list visits to a mercantile establishment as activities not constituting consideration for lottery purposes. Such visits have thus been held not exempt from lottery prosecution. Kayden Industries, Inc. v. Murphy, 34 Wis. 2d 718, 150 N.W.2d 447 (1967).

53. *See* text accompanying notes 17-23 *supra*.

The *Safeway* decision is indicative of a legislative vacuum in Washington. It has been left to the judiciary to develop an elaborate definition of "lottery." A more appropriate approach to the problem would be legislative identification of the evils of promotional schemes and control by enactments aimed at the discreet problems identified. Such an approach could best be implemented in three steps.

The first step would be deletion of the self-executing provision of the Washington Constitution[54] which now bans all lotteries.[55]

Secondly, R.C.W. 9.59.010, which now defines a lottery, should be limited by a constitutional amendment, perhaps similar to that enacted in Wisconsin.[56] This amendment would legalize some promotions which, under the *Safeway* case, would be illegal. The amendment should narrow the definition of "a valuable consideration" in order to prevent overbreadth in what the statute prescribes.

The final step would be the enactment of a regulatory statute, similar to the Trade Regulation Rule of the FTC,[57] or the New York[58] or Michigan[59] statutes, to control the deceptive trade practices, which have been the real vice of promotional games. This new regulatory statute should authorize the Consumer Protection Division of the Attorney General's Office to control and police such sales promotions by means of injunctive action or economic sanctions.[60]

With these three legislative actions, Washington can resolve the lottery problems created by the *Safeway* decision. The traditional gambling lottery would still be banned. The twentieth century promotional game of chance would be legalized, but stringently regulated in order to inform the consumer of the cost he bears by participation.

54. *See* note 7 *supra.*
55. *See* note 8 *supra.*
Michigan's constitutional provision, MICH. CONST. art. IV, § 41 states: "The legislature shall not authorize any lottery nor permit the sale of lottery tickets." When Michigan enacted specific regulatory legislation on lotteries (*see* note 46 and accompanying text *supra*), no mention was made of a constitutional amendment. But the broad self-executing label affixed by the Washington courts to the Washington State constitutional provision (*see* note 8 *supra*) distinguishes the Washington predicament from the Michigan situation where the courts have not given such a broad self-executing interpretation, and thus explains the possible necessity for a constitutional amendment in Washington.
56. *See* note 51 and accompanying text *supra.*
57. *See* note 45 and accompanying text *supra.*
58. *See* note 47 and accompanying text *supra.*
59. *See* note 46 and accompanying text *supra.*
60. The 1969 Texas legislature enacted such a regulatory provision as part of their Deceptive Trade Practices Act. TEX. REV. CIV. STAT. art. 5069-10.01(14), (15) (1969).

Finally, a specific agency interested in protecting the consumer would be given authority to establish guidelines for all businessmen, and to institute suit for the prosecution of firms for failure to comply.[61]

61. During the 1970 extraordinary session of the Washington State Legislature, Senate Joint Resolution No. 6 (SJR 6) was introduced to repeal the state constitutional ban against lotteries. The bill would have amended art. II, § 24 of the Washington State Constitution, *supra* note 7, to read thusly: "The state legislature shall never ~~((Author-ize-any-lottery-or))~~ grant any divorce." SJR 6 passed the Senate, but failed in the House of Representatives.

A second bill, Senate Joint Resolution No. 6 (SJR 17) would have amended art. II, § 24 in a more comprehensive manner:

> The legislature shall never ~~((authorize-any-lottery-or))~~ grant any divorce.
> The legislature shall never authorize any lottery, other than (1) a lottery operated by the state, its political subdivisions, or their agents solely for the purpose of raising public revenue; or (2) a lottery which is operated (a) solely by a person, firm, or corporation engaged primarily in this state in the business of making retail sales of tangible personal property, and (b) solely for the purpose of providing an inducement for such retail sales; or (3) a lottery, all proceeds from which are used exclusively for charitable, educational, historic, or public service purposes, as such purposes are defined by the legislature.

This bill, SJR 17, was not acted upon during the 1970 Legislative session.

On February 10, 1970, the Senate approved a resolution calling for an interim study by the Interim Municipal Committee to determine what course the Legislature might best take to "legally authorize certain lottery and gambling activities." The Seattle Times, Feb. 11, 1970, § A, at 6, col. 4.

On February 11, 1970, an initiative to remove the constitutional ban against lotteries was filed with the Secretary of State. Initiative backers must obtain approximately 115,000 signatures by July 3 to have the initiative placed on the November 3 general election ballot. The Seattle Times, Feb. 12, 1970, § A, at 10, col. 4.